

No. 19-507

IN THE

Supreme Court of the United States

PUBLISHERS BUSINESS SERVICES, INC., ED
DANTUMA ENTERPRISES, INC., EDWARD
DANTUMA, DRIES DANTUMA, DIRK DANTUMA,
JEFF DANTUMA, and BRENDA SCHANG,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

PETER W. HOMER

Counsel of record

CHRISTOPHER J. KING

HOWARD S. GOLDFARB

HOMER BONNER JACOBS

1200 Four Seasons Tower

1441 Brickell Avenue

Miami, Florida 33131

(305) 350-5100

phomer@homerbonner.com

June 30, 2020

Attorneys for Petitioners

RULE 29.6 DISCLOSURE STATEMENT

PBS's Rule 29.6 disclosure statement in the petition remains accurate.

RELATED PROCEEDINGS

The statement of related proceedings in the petition remains accurate.

SUPPLEMENTAL BRIEF

The PBS Petitioners submit this Supplemental Brief to address this Court’s decision last week in *Liu v. Sec. & Exch. Comm’n*, 18-1501 (U.S. June 22, 2020) and explain why that decision only increases the urgency for this Court’s resolution of the circuit split.

1. The question presented in this case is whether § 13(b) of the FTC Act empowers the FTC to seek *any* monetary relief when the statutory text provides only for a limited, forward-looking injunction, and when Congress provided the FTC an avenue to obtain substantial monetary relief in § 19 of the FTC Act. The Ninth Circuit in this case followed its precedent and held the answer is yes, and that the monetary relief available to the FTC under § 13(b) is virtually boundless. The Seventh Circuit, in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), held the answer is no, and that an injunction under § 13(b) in fact means just an *injunction*.

Liu says nothing about this circuit split. It does not discuss or concern the FTC Act or any statutory provision similar to § 13(b). *Liu* deals with 15 U.S.C. § 78u(d)(5) of the Securities Exchange Act of 1934, which allows the SEC to recover “any equitable relief that may be appropriate or necessary for the benefit of investors.” *Id.* The FTC Act has no similar “equitable relief” language. The only thing close to it is in § 19, which unlike 15 U.S.C. § 78u(d)(5) enumerates the specific remedies the FTC has available to it. Pet. App. 68a. The issue decided in *Liu* was how far the SEC’s right to “any equitable relief” may go in allowing monetary relief before that remedy becomes a “penalty” as defined by this Court’s decision in *Kokesh v. SEC*, 137 S.Ct. 1635, 1643-44 (2017). This Court held the SEC’s statute permits *typical* equitable

relief, meaning orders that strip wrongdoers of their ill-gotten gains and return the net profits to defrauded customers. *Liu*, slip op. at 5-6. It does not mean awards that exceed ill-gotten gains by failing to deduct legitimate expenses, with possible exceptions for companies whose entire profits resulted from fraud. Nor does it mean joint and several liability, with exceptions for defendants who acted in concert with wrongdoers. *Id.* at 6-11.

Were this Court, as Credit Bureau suggests, merely to grant, vacate, and remand this case in light of *Liu*, see Supp. Br. 4, *FTC v. Credit Bureau Ctr., LLC*, No. 19-825, PBS would immediately face a battery of resistance from the FTC. The FTC, which at first advocated for deferring a certiorari decision pending the outcome in *Liu* and then abandoned that position in asking for this Court's review, has already signaled that it views the statutory provisions and structures of the '34 Act and FTC Act as substantially different. See BIO.7-8. The FTC is certain to argue, to the extent it has not already, that *Liu*'s instruction on the extent of equitable monetary relief under the '34 Act has no application to the elaborate forms of purported "equitable" relief the Ninth Circuit has devised for § 13(b). And were the Ninth Circuit to accept and apply *Liu*, PBS faces another round of opposition over the possible exceptions *Liu* outlined for the deduction of expenses and joint and several liability. The exceptions should have no application here—only a small part of PBS's sales operations were found to have violated § 5 of the FTC Act, the individual Petitioners are in vastly different positions in terms of their role in the conduct at issue, and none received anywhere close to even a modest percentage of the amount of the judgment, nearly \$24 million. Pet. 10-11; see *FTC v. Publishers Bus. Services, Inc.*,

08-CV-00620, 2011 WL 7462205, at *2 (D. Nev. July 25, 2011). But the FTC will argue *Liu*'s exceptions apply nonetheless and require no adjustments to the judgment.

Were these arguments destined to impact the circuit split, a GVR may make sense. But the issues have nothing to do with the circuit split. However the Ninth Circuit decides them on a remand, the circuit split over whether typically available equitable remedies exist in § 13(b) would persist. And if those typical equitable remedies are not inferable from the text of § 13(b), as PBS maintains, *Liu*'s historical analysis of equitable relief arguably does not apply. In place of that analysis are the express statutory remedies Congress already debated and explicitly gave the FTC under § 19, together with important proof elements and limitations periods. Thus, even after *Liu*, this Court's answer on the circuit split is as urgent as ever. Granting review in this case will decide whether and to what extent *Liu* is relevant to the FTC Act.

2. PBS's petition remains the perfect vehicle to decide the split, as well. The Ninth Circuit's law on § 13(b) remedies remains the most extreme version among those circuits that have inferred monetary remedies from § 13(b)'s unambiguous text. As PBS can uniquely attest, the traditional discretion available to courts of equity is nonexistent in the Ninth Circuit, where deviation from a joint and several award of gross revenue or even customer losses is reversible error. *See FTC v. Publishers Bus. Serv's, Inc.*, 540 Fed. Appx. 555, 556–57 (9th Cir. 2013). The Respondents in *Credit Bureau* contend this Court should deny the petition in that case outright, as the Seventh Circuit's reasoning has supposedly been affirmed by *Liu*. Supp.

Br. 3, *Credit Bureau*, No. 19-825. It is not apparent how that could be, since the questions presented and the statutory schemes in the two cases are substantially different. This Court should review the circuit split under any circumstance. However, the FTC's petition in *Credit Bureau*, coming months after PBS's, is not a better vehicle if for no other reason than it lacks the Ninth Circuit's starkly legislative-like decisions, which rewrote the FTC Act's carefully calibrated statutory remedies. The Seventh Circuit did indeed get it right. But this Court should review the circuit split from the Ninth Circuit, where the lower courts' intrusion on the legislative role in rewriting § 13(b) is most pronounced.

AMG, the petitioner in the other case presenting the § 13(b) question, also comes from the Ninth Circuit and urges this Court's review. Supp. br. 3, *AMG Capital Mgmt., LLC v. FTC*, No. 19-508. AMG, claiming to be the best vehicle, makes a cryptic reference to the Solicitor General's argument that this case has a supposed "vehicle defect." *Id.* at 3. But the record and case law refute these contentions, which mirror baseless waiver claims made by the SEC against the petitioner in *Liu*. Reply Br. of Pet. 10, *Liu v. SEC*, No. 18-1501. Indeed, PBS is in the same or better position to challenge the Ninth Circuit's interpretation of § 13(b) vis-à-vis AMG. PBS raised that challenge in the district court, raised it again in the Ninth Circuit appeal below, and the Ninth Circuit decided the issue head-on, on the merits. Pet. App. 3a. The Solicitor General's argument therefore poses no obstacle to this Court's review here. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) (finding an issue actually decided on the merits by an appeals court inarguably ripe for this Court's review).

CONCLUSION

This Court should grant PBS's petition for a writ of certiorari.

Respectfully submitted,

PETER W. HOMER

Counsel of record

CHRISTOPHER J. KING

HOWARD S. GOLDFARB

HOMER BONNER JACOBS

1200 Four Seasons Tower

1441 Brickell Avenue

Miami, Florida 33131

(305) 350-5100

phomer@homerbonner.com

Attorneys for Petitioners

June 30, 2020